

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JODY K.,

Plaintiff,

V

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

CASE NO. 3:19-CV-5952-DWC

ORDER REVERSING AND  
REMANDING DEFENDANT'S  
DECISION TO DENY BENEFITS

Plaintiff filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of

Defendant's denial of Plaintiff's application for disability insurance benefits ("DIB"). Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. *See* Dkt. 2.

After considering the record, the Court concludes the Administrative Law Judge (“ALJ”) erred when he improperly evaluated Plaintiff’s testimony. As the ALJ’s error is not harmless this matter is reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to the Commissioner of the Social Security Administration (“Commissioner”) for further proceedings consistent with this Order.

**ORDER REVERSING AND REMANDING  
DEFENDANT'S DECISION TO DENY BENEFITS**

## FACTUAL AND PROCEDURAL HISTORY

2 On March 31, 2016, Plaintiff filed an application for DIB, alleging disability as of March  
3 18, 2015. *See* Dkt. 8, Administrative Record (“AR”) 22. The application was denied upon initial  
4 administrative review and on reconsideration. *See* AR 22. A hearing was held before ALJ  
5 Malcolm Ross on May 3, 2018. *See* AR 22. In a decision dated October 3, 2018, the ALJ  
6 determined Plaintiff to be not disabled. *See* AR 36. Plaintiff’s request for review of the ALJ’s  
7 decision was denied by the Appeals Council, making the ALJ’s decision the final decision of the  
8 Commissioner. *See* AR 19; 20 C.F.R. § 404.981, § 416.1481.

9 In the Opening Brief, Plaintiff maintains the ALJ erred by improperly considering: (1)  
10 Plaintiff's testimony; (2) the medical opinion evidence; and (3) the lay witness testimony. Dkt.  
11 10.

## STANDARD OF REVIEW

13 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
14 social security benefits if the ALJ's findings are based on legal error or not supported by  
15 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th  
16 Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

## DISCUSSION

## I. Whether the ALJ properly considered Plaintiff's testimony.

19 Plaintiff contends the ALJ failed to give clear and convincing reasons for discounting  
20 Plaintiff's subjective symptom testimony. Dkt. 10, pp. 2-10.

21 To reject a claimant's subjective complaints, the ALJ must provide "specific, cogent  
22 reasons for the disbelief." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996) (citation omitted).  
23 The ALJ "must identify what testimony is not credible and what evidence undermines the

1 claimant's complaints." *Id.*; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). Unless  
 2 affirmative evidence shows the claimant is malingering, the ALJ's reasons for rejecting the  
 3 claimant's testimony must be "clear and convincing." *Lester*, 81 F.2d at 834. Questions of  
 4 credibility are solely within the control of the ALJ. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th  
 5 Cir. 1982). The Court should not "second-guess" this credibility determination. *Allen v. Heckler*,  
 6 749 F.2d 577, 580 (9th Cir. 1984). In addition, the Court may not reverse a credibility  
 7 determination where that determination is based on contradictory or ambiguous evidence. *Id.* at  
 8 579.<sup>1</sup>

9 Plaintiff alleges various issues with cramping in her legs and with pain. For example,  
 10 Plaintiff reported that her leg cramps often impact her sleep and causes her to be unable to sit for  
 11 long periods of time because of pain. AR 241. Plaintiff was able to cook but needed to alternate  
 12 between sitting, standing, and lying down. AR 245. Plaintiff asserted doing sedentary tasks was  
 13 dependent on her pain on a given day. AR 245, 272. On a good day, Plaintiff testified she can  
 14 fold a load or two of laundry and prepare it to be put away. AR 59. Plaintiff further testified that  
 15 she can sometimes do the dishes or cook a meal, but her ability to do so is entirely consistent on  
 16 how she feels and if she has "had a bad day or a bad flare[.]" AR 59. Plaintiff indicated she  
 17 would be unable to perform even a sedentary job due to her limitations. AR 72. In two function  
 18 reports, Plaintiff stated that sitting for too long causes lower back and tail bone pain and also  
 19 indicated she is unable to stand for long periods of time. AR 241, 270.

20

---

21 <sup>1</sup> On March 28, 2016, the Social Security Administration changed the way it analyzes a claimant's  
 22 subjective symptom testimony. *See* SSR 16-3p, 2016 WL 1119029 (Mar. 16, 2016); 2016 WL 1237954 (Mar. 24,  
 23 2016). The term "credibility" is no longer used. 2016 WL 1119029, at \*1. Further, symptom evaluation is no longer  
 24 an examination of a claimant's character. *See id.* at \*10 ("adjudicators will not assess an individual's overall  
 character or truthfulness"). However, the applicable Ninth Circuit case law still refers to the term "credibility." *See*  
*Trevizo v. Berryhill*, 871 F.3d 664, 678 n.5 (9th Cir. 2017) (noting SSR 16-3p is consistent with existing Ninth  
 Circuit precedent). Thus, the Court will use "credibility" and "subjective symptom testimony" interchangeably.

1 The ALJ evaluated Plaintiff's testimony and found that "[Plaintiff's] medically  
 2 determinable impairments could reasonably be expected to cause some of the alleged symptoms;  
 3 however, [Plaintiff's] statements concerning the intensity, persistence, and limiting effects of  
 4 these symptoms are not entirely consistent with the medical evidence and other evidence in the  
 5 record..." AR 28. The ALJ discounted Plaintiff's testimony for two reasons: (1) the objective  
 6 medical evidence of record is "not consistent with the degree of limitation [Plaintiff] alleges";  
 7 and (2) Plaintiff's "records indicate actual functioning in her daily activities" that are  
 8 "inconsistent with the degree of limitation alleged." AR 28.

9 First, the ALJ discounted Plaintiff's testimony because her testimony is inconsistent with  
 10 the medical evidence of record. AR 28. Determining that a claimant's complaints are  
 11 "inconsistent with clinical observations" can satisfy the clear and convincing requirement.  
 12 *Regennitter v. Commissioner of Social Sec. Admin.*, 166 F.3d 1294, 1297 (9th Cir. 1998); *see*  
 13 *also Fisher v. Astrue*, 429 F. App'x 649, 651 (9th Cir. 2011). However, an ALJ "may not  
 14 disregard [a claimant's credibility] solely because it is not substantiated affirmatively by  
 15 objective medical evidence." *Robbins v. Social Security Administration*, 466 F.3d 880, 883 (9th  
 16 Cir. 2006); *see Orteza v. Shalala*, 50 F.3d 748, 749-750 (9th Cir. 1995); *Byrnes v. Shalala*, 60  
 17 F.3d 639, 641-642 (9th Cir. 1995). Thus, the ALJ cannot discount Plaintiff's testimony on this  
 18 basis alone. But, the only other reason the ALJ gave for discounting Plaintiff's testimony is  
 19 because the testimony was inconsistent with Plaintiff's activities of daily living, and, as  
 20 discussed below, this second reason is not clear and convincing. Therefore, the ALJ's first reason  
 21 is the only potentially valid reason for discounting Plaintiff's subjective symptom testimony. As  
 22 the ALJ may not discount Plaintiff's testimony solely because the testimony is unsupported by  
 23 the objective medical evidence, the Court need not consider if the ALJ's first reason is supported  
 24

1 by substantial evidence. Therefore, the Court finds the ALJ's first reason for discounting  
 2 Plaintiff's testimony is not adequate to affirm the ALJ's decision to discount the testimony.

3 The ALJ's next discounted Plaintiff's testimony because it is inconsistent with Plaintiff's  
 4 activities of daily living. AR 28. There are two grounds under which an ALJ may use daily  
 5 activities to form the basis of an adverse credibility determination: (1) whether the activities  
 6 contradict the claimant's other testimony, and (2) whether the activities of daily living meet  
 7 "the threshold for transferable work skills." *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007).

8 In this case, the ALJ referred to the first ground by claiming Plaintiff's activities were  
 9 inconsistent with her allegations. *See* AR 28. Although the ALJ claimed Plaintiff's daily  
 10 activities were inconsistent with her allegations, he failed to specify what activities he was  
 11 referring to and failed to explain *how* any of the cited activities undermined Plaintiff's testimony.  
 12 *See* AR 28. As the ALJ did not explain "which daily activities conflicted with which part of  
 13 [Plaintiff's] testimony," he erred. *See Burrell v. Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014)  
 14 (emphasis in original); *see also Lester*, 821 F.3d at 834 (citation omitted) ("General findings [of  
 15 credibility] are insufficient; rather, the ALJ must identify what testimony is not credible and  
 16 what evidence undermines the claimant's complaints.").

17 Accordingly, the ALJ's conclusion that Plaintiff's activities show she is more functional  
 18 than she alleges is not a clear and convincing reason to discount Plaintiff's testimony. *See*  
 19 *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (recognizing "disability claimants should  
 20 not be penalized for attempting to lead normal lives in the face of their limitations").

21 For the above stated reasons, the Court finds the ALJ has not provided a clear and  
 22 convincing reason for discounting Plaintiff's subjective symptom testimony. Accordingly, the  
 23 ALJ erred.

1        “[H]armless error principles apply in the Social Security context.” *Molina v. Astrue*, 674  
 2 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless, however, only if it is not prejudicial to the  
 3 claimant or “inconsequential” to the ALJ’s “ultimate nondisability determination.” *Stout v.*  
 4 *Commissioner, Social Security Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see Molina*, 674  
 5 F.3d at 1115. The determination as to whether an error is harmless requires a “case-specific  
 6 application of judgment” by the reviewing court, based on an examination of the record made  
 7 “without regard to errors’ that do not affect the parties’ ‘substantial rights.’” *Molina*, 674 F.3d at  
 8 1118-1119 (*quoting Shinseki v. Sanders*, 556 U.S. 396, 407 (2009)).

9        Plaintiff testified to greater limitations than were included in the residual functional  
 10 capacity (“RFC”). For example, Plaintiff testified that sitting for too long causes lower back and  
 11 tail bone pain and that she is unable to stand for long periods of time. AR 241, 270. In contrast,  
 12 the ALJ did not include any information regarding Plaintiff’s ability to sit and stand in the RFC.  
 13 *See* AR 27. Had the ALJ properly considered Plaintiff’s testimony, he may have included  
 14 additional limitations in the RFC and in the hypothetical questions posed to the vocational  
 15 expert. As the ultimate disability determination may have changed, the ALJ’s error is not  
 16 harmless and requires reversal. The ALJ is directed to reassess Plaintiff’s testimony on remand.

17        **II.      Whether the ALJ properly considered the medical opinion evidence.**

18        Plaintiff contends the ALJ provided too much weight to Dr. Gary Gaffield’s opinion and  
 19 improperly discounted PAC David Kirkpatrick’s opinion. Dkt. 10, pp. 10-13.

20        In assessing an acceptable medical source, an ALJ must provide “clear and convincing”  
 21 reasons for rejecting the uncontradicted opinion of either a treating or examining physician. *Lester*,  
 22 81 F.3d at 830 (citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)); *Embrey v. Bowen*, 849  
 23 F.2d 418, 422 (9th Cir. 1988). When a treating or examining physician’s opinion is contradicted,  
 24

1 the opinion can be rejected “for specific and legitimate reasons that are supported by substantial  
 2 evidence in the record.” *Lester*, 81 F.3d at 830-831 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043  
 3 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). The ALJ can accomplish  
 4 this by “setting out a detailed and thorough summary of the facts and conflicting clinical evidence,  
 5 stating his interpretation thereof, and making findings.” *Reddick*, 157 F.3d at 725 (citing  
 6 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)). “Other medical source” testimony “is  
 7 competent evidence that an ALJ must take into account,” unless the ALJ “expressly determines to  
 8 disregard such testimony and gives reasons germane to each witness for doing so.” *Lewis v. Apfel*,  
 9 236 F.3d 503, 511 (9th Cir. 2001); *Turner v. Comm’r of Soc. Sec.*, 613 F.3d 1217, 1224 (9th Cir.  
 10 2010). “Further, the reasons ‘germane to each witness’ must be specific.” *Bruce v. Astrue*, 557  
 11 F.3d 1113, 1115 (9th Cir. 2009).

12       A. Dr. Gaffield

13       Consultative examiner Dr. Gaffield opined Plaintiff could lift and/or carry 50 pounds  
 14 occasionally and 25 pounds frequently. AR 434. He also found Plaintiff could stand and/or walk  
 15 no more than 6 hours in an 8-hour day and had no limitations in her ability to sit. AR 434. Dr.  
 16 Gaffield opined Plaintiff needs to avoid heights, stairs, ladders, scaffolding, and major obstacles  
 17 in her pathway. AR 434.

18       The ALJ provided great weight to Dr. Gaffield’s opinion, finding that the opinion “was  
 19 generally consistent with the longitudinal record and with his examination.” See AR 33. Plaintiff  
 20 argues the ALJ improperly provided great weight to Dr. Gaffield’s opinion because all of  
 21 impairments the ALJ found as severe caused Plaintiff pain, and the ALJ failed to “consider the  
 22 impact of this pain when weighing the evidence[,]” which he was required to do. Dkt. 10, p. 11.  
 23 Further, Plaintiff asserts that the ALJ “could not simply rely on a consistency between the  
 24

1 objective findings in the record and the objective findings from the examining source's  
 2 examination." *Id.* Plaintiff's argument is unpersuasive, for two reasons. First, Plaintiff's assertion  
 3 that the ALJ failed to consider the impact of Plaintiff's pain in assessing Dr. Gaffield's opinion is  
 4 incorrect. The ALJ included greater limitations in Plaintiff's RFC than Dr. Gaffield opined to "in  
 5 order to account for [Plaintiff's] pain complaints along with her morbid obesity." AR 33. Thus,  
 6 the ALJ clearly considered the impact of Plaintiff's pain in assessing Dr. Gaffield's opinion.

7 Second, Plaintiff's claim that the ALJ could not rely on a consistency between the record  
 8 and Dr. Gaffield's opinion in providing the opinion great weight runs contrary to SSA  
 9 regulations. In fact, the SSA indicates that "the more consistent a medical opinion is with the  
 10 record as a whole, the more weight we will give to that medical opinion." 20 C.F.R. §  
 11 404.1527(c)(3)-(4). Accordingly, Plaintiff's argument that the ALJ provided too much weight to  
 12 Dr. Gaffield's opinion is unfounded.

13       B. Mr. Kirkpatrick

14       Mr. Kirkpatrick, an "other" source per SSA regulations, was Plaintiff's treating PAC. *See*  
 15 AR 441-444. Mr. Kirkpatrick opined to several limitations as a result of Plaintiff's impairments.  
 16 *See id.* For example, Mr. Kirkpatrick opined Plaintiff would miss two full workdays or more a  
 17 month even if performing a simple, routine, sedentary job because of her impairments. AR 441.  
 18 He found Plaintiff could occasionally lift and/or carry up to 15 pounds and could frequently lift  
 19 and/or carry up to 10 pounds in an 8-hour workday. AR 441. He stated Plaintiff had a marked  
 20 limitation in her concentration, persistence, or pace. AR 442.

21       The ALJ discussed Mr. Kirkpatrick's opinion and provided it low weight for two reasons:  
 22 (1) it is inconsistent with the record; and (2) it is internally inconsistent. AR 33-34.

1 The Court finds the ALJ's first reason is germane. The ALJ provides two examples in  
 2 support of his conclusion that Mr. Kirkpatrick's opinion is inconsistent with the record. First, he  
 3 notes "the evidence does not support restrictions for carpal tunnel syndrome as [Plaintiff's]  
 4 release surgery fully addressed this condition..." AR 33, citing AR 430. Next, the ALJ notes  
 5 many of Plaintiff's activities, including activities involving the use of her hands (i.e. crocheting,  
 6 sewing, crafts, working on a computer), demonstrate Mr. Kirkpatrick's opinion describes overly  
 7 restrictive manipulative limitations. AR 33, citing AR 430, 435. While Plaintiff's activities of  
 8 daily living do not necessarily show she has the functional capacity to engage in substantial  
 9 gainful activity, they do support the conflict the ALJ identified with Mr. Kirkpatrick's opinion.  
 10 The role of the Court is not to reweigh the evidence and arrive at an independent conclusion.  
 11 *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996). The ALJ is responsible for resolving  
 12 ambiguities and conflicts in the medical evidence. *Reddick*, 157 F.3d at 722. If the evidence "is  
 13 susceptible to more than one rational interpretation," including one supporting the decision of  
 14 the Commissioner, the Commissioner's conclusion "must be upheld." *Thomas v. Barnhart*, 278  
 15 F.3d 947, 954 (9th Cir. 2002) (citing *Morgan*, 169 F.3d at 599, 601). Thus, because substantial  
 16 evidence supports the ALJ's conclusion, the Court finds the first reason for discounting Mr.  
 17 Kirkpatrick's opinion is germane.

18 While the ALJ had an additional reason to discount Mr. Kirkpatrick's opinion, the  
 19 Court need not consider whether this reason contained error, as any error would be harmless  
 20 because the ALJ gave a germane reason to discount the opinion. *See Presley-Carrillo v.*  
 21 *Berryhill*, 692 F. Appx. 941, 944-945 (9th Cir. 2017) (citing *Carmickle v. Comm'r of Soc. Sec.*  
 22 *Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008) (noting that although an ALJ erred with regard to  
 23 one reason he gave to discount a medical source, "this error was harmless because the ALJ

1 gave a reason supported by the record" to discount the source). Accordingly, the Court finds  
2 the ALJ properly discounted Mr. Kirkpatrick's opinion.

3 **III. Whether the ALJ properly evaluated the lay witness testimony.**

4 Plaintiff asserts the ALJ improperly rejected the lay witness testimony. Dkt. 10, pp. 13-  
5 16. The Court concludes the ALJ committed harmful error in assessing Plaintiff's testimony and  
6 must re-evaluate her testimony on remand. *See Section I, supra.* Because Plaintiff will be  
7 allowed to present new testimony and new evidence on remand and because the ALJ's  
8 reconsideration of Plaintiff's testimony may have an impact on his assessment of the lay witness  
9 testimony, the ALJ must reconsider the lay witness testimony on remand.

10 **CONCLUSION**

11 Based on the foregoing reasons, the Court hereby finds the ALJ improperly concluded  
12 Plaintiff was not disabled. Accordingly, Defendant's decision to deny benefits is reversed and  
13 this matter is remanded for further administrative proceedings in accordance with the findings  
14 contained herein.

15 Dated this 10th day of March, 2021.

16  
17   
18 David W. Christel  
19 United States Magistrate Judge  
20  
21  
22  
23  
24